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IN THE
COURT OF APPEALS OF INDIANA

WILLIAM T. DANE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 33A01-0511-CR-493
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable John L. Kellam, Judge
The Honorable David W. Whitton, Judge
The Honorable Mary G. Willis, Judge
Cause No. 33C01-0001-CF-3

September 12, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

William T. Dane (Dane) files a belated appeal challenging his sentences for robbery, as a class B felony, and three counts of criminal confinement, as class B felonies, after pleading guilty to the same.

We affirm.

ISSUES

1. Whether the trial court erred when it sentenced Dane.

2. Whether the trial court committed prejudicial error when it failed to advise Dane of his appeal rights.

CROSS-APPEAL ISSUE

Whether the trial court erred in granting a late appeal.

FACTS

On January 28, 2000, Dane was arrested and charged with count 1, robbery as a class B felony; and, counts II - IV, criminal confinement as class B felonies. The State also filed an habitual offender charge and a notice of firearm sentence enhancement "pursuant to I.C. 35-50-2-11." (Tr. 2). Dane entered into a plea agreement with the State wherein he agreed to plead guilty to counts I - IV; in exchange the State agreed to dismiss both enhancement charges. The plea agreement provided for a cap of 30 years with the trial court having discretion to sentence within that range.

On July 18, 2000, the trial court accepted Dane's guilty plea and conducted a sentencing hearing. After considering the pre-sentence investigation report and the arguments of counsel, the trial court sentenced Dane to 15 years on each count with counts II, III, IV being served concurrently but consecutively to count I, for a total

sentence of 30 years. The trial court further ordered that the sentence imposed would be served consecutively to any sentence Dane received on a probation matter he had pending in another county.

DISCUSSION

Cross Appeal[1]

The State argues that Dane's appeal should be dismissed for lack of jurisdiction because the trial court abused its discretion when it granted Dane permission to file a belated notice of appeal.

Indiana Post-Conviction Rule 2 permits a defendant to seek permission to file a belated notice of appeal. The rule provides in part:

> Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:
>
> (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
>
> (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

Ind. Post-Conviction Rule 2(1). Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal. Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). The burden is on the defendant to prove by a preponderance of the evidence that he is entitled to relief. Beaudry v. State, 763 N.E.2d 487, 489 (Ind. Ct. App. 2000).

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[1] Because the issue raised by the State on cross-appeal implicates this court's jurisdiction, we address it first. See Hull v. State, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005).

> Factors affecting this determination include the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay.

Hull v. State, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005) (quoting Baysinger, 835 N.E.2d at 224). When, "as here, the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only bases for that decision are the allegations contained in the motion to file a belated notice of appeal." See Hull, 839 N.E.2d at 1253. "Because we are reviewing the same information that was available to the trial court, we owe no deference to its findings." Id. Thus, we review the grant of Dane's motion de novo. See id.

Because there was no hearing held on the motion, we view the only bases for the trial court's grant of the motion to be the allegations contained in the motion to file a belated notice of appeal. See Hull 839 N.E.2d at 1253. In Hull's motion to file a belated notice of appeal, he averred that the delay of filing an appeal was not his fault because "the trial court did not inform him at his sentencing that he could appeal his sentence. . . ." Id. However, in this matter, Dane only averred that, "[t]he Defendant's failure to file a timely notice of appeal was not due to the fault of the Defendant." (App. 104). Additionally, the trial court in its order did not state upon what bases it granted the motion. As a result, we find that Dane did not prove by a preponderance of the evidence he was entitled to relief. However, we decline to decide this case on the basis of waiver, and turn instead to the merits.

1. Erroneous Sentence[2]

Dane argues that the trial court erred when it sentenced him, specifically that: (1) it failed to find his guilty plea and expressions of remorse as mitigating factors; (2) it failed to state why each circumstance was mitigating or aggravating; and (3) it failed to articulate a balancing of the circumstances.

Sentencing decisions rest within the discretion of the trial court and are reviewed on appeal only for an abuse of discretion. Ray v. State, 838 N.E.2d 480, 491 (Ind. Ct. App. 2005). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances. Id. A class B felony has a fixed term of ten years with not more than ten years added for aggravating circumstances. In this matter, Dane was sentenced to fifteen years executed on each of his class B felony convictions. Because Dane received an enhanced sentence, the trial court's sentencing statement must: (1) identify significant aggravating and mitigating circumstances; (2) state the specific reason why each circumstance is aggravating and mitigating; and (3) demonstrate that the aggravating and mitigating circumstances have been weighed to determine that the aggravators outweigh the mitigators. Simmons v. State, 814 N.E.2d 670, 676 (Ind. Ct. App. 2004). We examine both the written sentencing order and the trial court's comments at the sentencing hearing to determine whether the trial court adequately explained the reasons for the sentence. Id.

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[2] Dane was sentenced for his offenses in 2000, before April 25, 2005, when Indiana Code section 35-50-2-1.3 (2005) was amended to provide for an "advisory" rather than "presumptive" sentence. Because another panel of this court recently held that the change constituted a substantive rather than procedural change we will not apply an advisory sentence retroactively. Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied.

In its pronouncement of sentence, the trial court found four aggravating factors: (1) Dane was likely to commit another offense; (2) criminal history; (3) nature and circumstances of the crime; and, (4) Dane was on probation when he committed the new offense.

a. Mitigating Factors

Dane argues that the trial court erred when it did not find that his entering into a plea agreement and his remorsefulness were mitigating factors. We disagree. "A finding of mitigating circumstances, like sentencing decisions in general, lies within the trial court's discretion." Wilkie v. State, 813 N.E.2d 794, 799 (Ind. Ct. App. 2004), trans. denied. "Although a trial court must consider evidence of mitigating circumstances presented by the defendant, it is not obligated to explain why it has found that the mitigator does not exist." Id. "This is particularly true when an examination of the underlying record shows the highly disputable nature of the mitigating factors." Tunstill v. State, 568 N.E.2d 539, 545 (Ind. 1991) (quoting Wilkins v. State, 500 N.E.2d 747, 749 (Ind. 1986)). On the other hand, "[a] trial court must include mitigators in its sentencing statement only if they are used to offset aggravators or to reduce the presumptive sentence, and only those mitigators found to be significant must be enumerated." Id. "Indeed 'the proper weight to be afforded by the trial court to the mitigating factors may be to give them no weight at all.'" Wilkie 813 N.E.2d at 799 (quoting Ross v. State, 676 N.E.2d 339, 347 (Ind. 1996)).

During the sentencing hearing, while identifying aggravating and mitigating factors, the trial court also considered Dane's plea of guilty. In doing so, it found that

Dane had received a significant benefit for pleading guilty, specifically that the State had dismissed the two enhancements, which the trial court noted, if founded would have added approximately "35 years" to his sentence. (Tr. 54). Furthermore, "[a] guilty plea is not automatically a significant mitigating factor." Comer v. State, 839 N.E.2d 721, 728 (Ind. Ct. App. 2005). Whether a defendant has entered into a guilty plea agreement can be a tactical or practical decision made for his benefit. Here, Dane received a significant benefit for his guilty plea when the State dismissed the enhancements, which potentially could have added an additional 35 years to his sentence; therefore, the trial court did not abuse its discretion when it did not find it as a mitigating factor. See id.

Next, Dane argues the trial court erred when it did not find his remorsefulness as a mitigating factor. At his sentencing hearing, Dane offered the following statement:

> All I'd like to say, Your Honor, is I'm, I'm sorry about what happened to Mr. Stewart and if there's anyway I can make, you know, amends for it other than doin' the time that I'm gonna [sic] get, I'd be more than willing to do that. I wouldn't – I didn't intend for nobody to get hurt that night and that's a fact. That's all I have to say, Your Honor.

(Tr. 36). As we stated before, a trial court must include mitigators in its sentencing statement only if it would have offset aggravators or to reduce the presumptive sentence, and only those mitigators found to be significant must be enumerated. See Tunstill, 568 N.E.2d at 545. We find that Dane's statement did not amount to a significant mitigator. Accordingly, we conclude the trial court did not abuse its discretion when it accorded Dane's proffered mitigator no weight at all. See Wilkie, 813 N.E.2d at 799.

b. Enhanced Sentence

Dane argues that the trial court failed to articulate in sentencing why it found factors to be either aggravating or mitigating and to balance them in accordance with Indiana Code section 35-38-1-7.1. We disagree. Dane concedes that the trial court sufficiently articulated its finding of the aggravating factor, nature and circumstances of the crime, but Dane challenges its failure to articulate its reasoning regarding the remaining aggravating factors. Dane's Br. 10.

In its pronouncement of sentence, the trial court found four aggravating factors: (1) Dane was likely to commit another offense; (2) criminal history; (3) nature and circumstances of the crime; and, (4) Dane was on probation when he committed the new offense. First, in finding that Dane would likely commit another crime, the trial court explained that since Dane's debut in the criminal justice system as a juvenile, in 1963, Dane has maintained a "continuous involvement with criminal law processes in this state and other states." (Tr. 51). Next, the trial court found Dane's prior criminal history an aggravating factor, citing Dane's 12 prior felony and 13 misdemeanor convictions. The trial court noted Dane's being on probation at the time he committed the instant offense for which he was being sentenced was found to be an aggravator. The trial court stated: "the only mitigating circumstance that I can find here at all is that while Mr. Dane has a lengthy record, he has no prior convictions for crimes of violence" with the exception of one conviction for battery in 1982. (Tr. 54). The trial court then concluded, "I've considered all these matters and find that the aggravating circumstances in the cause greatly outweigh the mitigating circumstances." (Tr. 54).

We find the trial court's articulation of the aggravating and mitigating circumstances was sufficient, and the court did not abuse its discretion in finding that the four aggravating circumstances outweighed the one mitigating circumstance.

2. Trial Court's Advisement of Appeal Rights

Dane argues on appeal that the trial court prejudiced him when it failed to advise him of his appeal rights and that this court, as a remedy, should order Dane's sentence to be served concurrently rather than consecutively. We disagree and decline.

"Although a defendant who pleads guilty may not challenge his conviction by direct appeal, such a defendant is entitled to contest upon direct appeal the merits of a trial court's sentencing discretion where the court has exercised such discretion." Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004); Taylor v. State, 780 N.E.2d 430, 432 (Ind. Ct. App. 2002). During the sentencing hearing, the trial court advised Dane that, "by pleading guilty you'd be giving up your right to appeal your convictions and sentences." (Tr. 7). We find that the trial court failed to advise Dane that he had a right to challenge the merits of his sentence on appeal. However, based upon the record herein, Dane has not shown that he was prejudiced by the trial court's lack of advisement at sentencing. Although, Indiana's statute and trial rules do not require[3] that a trial judge, who has exercised discretion at sentencing after defendant has pled guilty, must advise the defendant that he has the right to challenge on appeal the merits of the trial court's exercise of that discretion at sentencing, it is logical and the better practice and consistent

[3] See Taylor, 780 N.E.2d at 435 (citing Garcia v. State, 466 N.E.2d 33, 34-35 (Ind. 1984)).

with the holdings in the cases of Collins, Taylor, supra, that we hereby recommend that such an advisement be given.

We affirm.

RILEY, J., and VAIDIK, J., concur.